

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

RODERICK K. JOHNSON

Petitioner,

v.

DIRECTOR, TDCJ-CID,

Respondent.

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Civil Action No. 2:12cv319
Consolidating No 2:12cv403

MEMORANDUM ORDER AND OPINION

Came on for consideration, Petitioner's Motion for Review of the Report and Recommendation of the Magistrate Judge (docket entry #28).


On January 13, 2014, the assigned Magistrate Judge issued a Report and Recommendation ("R&R") that Petitioner's federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 was time-barred and should be dismissed with prejudice. Docket entry #23. It contained the advisory to Petitioner that "[w]ithin fourteen (14) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations contained in the report." *Id.* at 11. Further, that the failure to file written objections shall bar that party from *de novo* review by the district judge and from appellate review except on grounds of plain error. *Id.* Petitioner acknowledged receipt of the R&R on January 15, 2014. Docket entry #24. He did not file any written objections to the R&R. However, on January 30, 2014, he filed a Notice of Appeal of the Magistrate Judge's R&R. Docket entry #25. The undersigned District Judge adopted the R&R and issued a Final Judgment on February 3, 2014. Docket entry #26. On April 15, 2014, the United States Court of Appeals for the Fifth Circuit entered a Judgment, issued as the mandate, on Petitioner's Notice of Appeal, finding it lacked jurisdiction over the

purported appeal because a Magistrate Judge's R&R is not a final order and is not otherwise appealable; further, though the District Court subsequently adopted the R&R and issued Final Judgment, Petitioner's Notice of Appeal was not effective for the purpose of appealing that judgment. *See Johnson v. Stephens*, USAC No. 14-40089 (5th Cir. Apr. 15, 2014) (per curiam).

Petitioner now seeks review of the R&R. His motion might otherwise be construed as a motion for reconsideration of the judgment pursuant to either Fed. R. Civ. P. 59(e) or 60(b). However, he recites the basis for the Fifth Circuit's determination and then "motions this Court to review the Report and Recommendation of the Magistrate Judge due to the Report and Recommendation of a Magistrate Judge is not a final order and it does not fall into any other categories that would make it appealable." Motion at 2. It therefore appears that he seeks a final order in this case. However, such a final order was entered when the District Court adopted the R&R and entered Final Judgment. Docket entry #26; *see also* Fed. R. Civ. P. 58. Therefore, Petitioner's motion seeks relief that already exists on the face of the record. Accordingly, it is hereby

ORDERED that Petitioner's Motion for Review of the Report and Recommendation of the Magistrate Judge (docket entry #28) is **DENIED** as **MOOT**.

So ORDERED and SIGNED this 15th day of July, 2014.



RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE